



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 19, 2004

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Conyers:

Thank you for your letter, dated July 9, 2004, inquiring about grand jury subpoenas, search warrants, and orders for production of records by the Foreign Intelligence Surveillance Act court ("FISA court") pursuant to section 215 of the USA PATRIOT Act ("PATRIOT Act"). Due in part to misinformation offered during consideration of the Sanders amendment there appears to be a great deal of confusion about the standards for, and use of, grand jury subpoenas, search warrants, and section 215 orders.

In your July 7 "Dear Colleague letter" on this issue, you inaccurately asserted that grand jury subpoenas issued for business records, including library records, in ordinary criminal investigations are governed by a probable cause standard. This assertion is false. It is well established that the simple standard of relevance governs grand jury subpoenas in criminal investigations. *See, e.g., United States v. R. Enterprises*, 498 U.S. 292, 301 (1991). A similar standard applies to the issuance of FISA court orders for the production of business records in authorized international terrorism and espionage investigations pursuant to section 215 of the PATRIOT Act. *See* 50 U.S.C. §§ 1861(a)(1), 1862(b)(2). It is no coincidence that similar standards apply to these investigative tools. Grand jury subpoenas and section 215 orders are not warrants for searches and seizures – for which the Fourth Amendment to the Constitution requires probable cause – but rather informational requests to third parties, and the building blocks of criminal and international terrorism/espionage investigations, respectively.

To be sure, there is one critical difference between grand jury subpoenas for business records in criminal investigations and section 215 orders for the production of those same records in international terrorism and espionage investigations. Section 215 orders must be approved by a judge, whereas a judge generally does not review grand jury subpoenas before they are issued. The judicial oversight required by section 215 is a critical check that ensures that requests are only made for the production of relevant records. Indeed, far from serving as a "rubber stamp" for government agents seeking

section 215 orders, the independent FISA court may approve a section 215 order *only* “if the judge finds that the application meets the requirements of this section” including, that the judge is satisfied that the requested records are relevant to an authorized international terrorism or espionage investigation. *See* 50 U.S.C. §§ 1861 (c)(1), 1861(b)(2). Thus, section 215 applies to a far narrower set of cases or circumstances than do grand jury subpoenas.

In response to your specific request: it fundamentally misconceives the roles of the grand jury and FISA systems to suggest that grand juries’ issuance of subpoenas to various businesses (including libraries and bookstores) for records relevant to general criminal inquiries justifies depriving intelligence authorities of similar authority under FISA in the context of international terrorism or espionage investigations. Grand juries are critical to investigating crimes. However, it is the Department of Justice’s goal to prevent acts of terrorism, and fulfilling that goal may require the government to obtain information before a terrorist has the opportunity to act, and without tipping that terrorist off. In some circumstances, it may be inappropriate to convene a grand jury, but necessary and proper to seek a FISA court order pursuant to section 215 in order to locate a terrorist and stop an attack. As an investigative tool, therefore, it cannot be said that in all cases, for all time, a grand jury subpoena is an adequate substitute for a court-approved order under FISA.

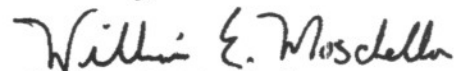
Furthermore, your implication that FISA court orders are issued secretly in order to violate “privacy and free speech rights” is wrong. As discussed above, the reason why these orders may not be disclosed in international terrorism and espionage cases is so that *terrorists and spies do not discover that the government is investigating them*. Any concerns that nondisclosure obligations might infringe on constitutional rights are counterbalanced by protections such as prior approval by the FISA court and prohibitions on investigations of United States persons based solely on First Amendment-related activities – protections not present in the grand jury context. In fact, legislative history demonstrates that Congress itself enacted FISA in order to create a “secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation’s commitment to privacy and individual rights.” *ACLU Found. of Southern California v. Barr*, 952 F.2d 457, 460 (D.C. Cir. 1991), *quoting* S. Rep. No. 604, 95th Cong., 1st Sess., at 15 (1977).¹ It bears noting that grand juries largely operate in secret as well, pursuant to Federal Rule of Criminal Procedure 6(e)(2).

¹ This has also been the view of the executive branch for over a quarter-century. In assessing Senator Kennedy’s FISA bill, then-Attorney General Griffin Bell, in part quoting President Carter, stated that “One of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our nation’s security on the one hand, and the preservation of basic human rights on the other.’ It is a very delicate balance to strike, but one which is necessary in our society. In my view this bill strikes the balance, sacrifices neither our security nor our civil liberties, and assures that the abuses of the past will remain in the past and that the dedicated and patriotic men and women who serve this country in intelligence positions, often under substantial hardships and even danger will have the affirmation of Congress that their activities are proper and necessary.” S. Rep. No. 95-701, at 6-7 (1978), *quoting* Hearing before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Foreign Intelligence Surveillance Act Of 1977, 95th Cong., 1st Sess., at 13 (1977).

Finally, any claim that a FISA court order under section 215 allows the Department "to pry into the reading habits of law-abiding Americans at libraries and bookstores" is mistaken. First, we have absolutely no interest in the reading habits of law-abiding citizens. Our only interest is fulfilling our responsibility to protect the American people from future Acts of terrorism. Second, to obtain a section 215 order, the government must demonstrate to a judge that the information sought is connected with an investigation "to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2). Moreover, current law explicitly, broadly, and repeatedly protects the liberty of "law-abiding Americans" by providing that "an investigation conducted under [FISA] shall not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States." 50 U.S.C. § 1861(a)(2)(B); *see also* 50 U.S.C. § 1861(a)(1) (the FBI may obtain a section 215 order "to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution"). These provisions safeguard the rights of law-abiding Americans, while giving the government a critical tool for tracking terrorists and spies.

We hope this information is useful to you and your colleagues and please don't hesitate to contact this office if we can be of further assistance.

Sincerely,

A handwritten signature in dark ink, appearing to read "William E. Moschella". The signature is fluid and cursive, with the first name "William" and last name "Moschella" clearly distinguishable.

William E. Moschella
Assistant Attorney General

cc: The Honorable F. James Sensenbrenner, Jr.
Chairman